MAR 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1005

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*
AND
ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*

No. 75-1008

SIDNEY S. HARRIS, *et al.*,
Petitioners,
v.
ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*
AND
UNITED STATES OF AMERICA, *et al.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO

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United Steelworkers of America, AFL-CIO (hereinafter "the Union") submits this consolidated brief in opposition to the two petitions for certiorari seeking review of

the Fifth Circuit's decision in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826.

COUNTER-STATEMENT OF THE CASE

On April 12, 1974, culminating "more than six months of intensive, hard fought negotiations," 517 F.2d at 834, the three government agencies responsible for enforcing equal employment legislation (the EEOC and the Departments of Justice and Labor) joined with nine major steel companies and the Union in submitting two proposed consent decrees to the district court for the Northern District of Alabama. The decrees were entered that day. The "overriding goal" of all parties, in proposing the decrees, was "comprehensive, final and fair settlement of charges of uniawful employment discrimination arising from patterns and practices alleged upon the part of the companies and the union up to and including the entry date of the consent decrees," *id.* at 837. The three government agencies "have stated in so many words that they consider the decrees remedially adequate to bring the defendants into present compliance with federal anti-discrimination law and to compensate individual employees for the past and continuing effects of the alleged discriminatory practices which the decrees enjoin," *id.* at 838.

The petitions for certiorari seek review of the validity of Consent Decree I, the decree which relates to those matters for which both the companies and the Union have responsibility.[1] As the court below explained, *id.* at 834-835, this decree:

> permanently enjoins the defendants from "discriminating in any aspect of employment on the basis of race, color, sex or national origin and from failing or

[1] Consent Decree II, to which the Union is not a party, deals with those matters under the exclusive control of the companies, e.g. hiring, and filling of supervisory and managerial positions.

refusing to fully implement" the substantive relief set forth therein. The items covered by Consent Decree I are mainly matters historically encompassed by collective bargaining. The substantive relief falls into three basic categories: (1) immediate implementation of broad plantwide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental, and line of progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments; (2) establishment of goals and timetables for fuller utilization of females and minorities in occupations and job categories from which they were discriminatorily excluded in the past; and (3) a back pay fund of $30,940,000, to be paid to minority and female employees injured by the unlawful practices alleged in the complaint.

Although the Harris petitioners express doubts in *this* Court about the ultimate success of the decree's injunctive reforms[2]—doubts which are not explained or substantiated in any respect—they expressed no similar doubts in the lower courts. Thus, the court below correctly observed that "the Harris appellants have challenged seriously the adequacy of the decrees' injunctive measures neither in the district court nor in this court." 517 F.2d at 851.

With respect to the decree's back pay feature, each employee is afforded an option: he may reject the backpay tender, and remain as free as before to pursue his rights under Title VII (while, incidentally, enjoying the benefit of the non-monetary reforms achieved by the decree), or he may accept the back pay tender by executing a release of all claims against the defendants for pre-decree discrimi-

[2] "[W]hether, as petitioners contend, the decrees are unlikely to produce meaningful reforms of the seniority systems is a question whose answer will not be known for several years." (Harris Petition, p. 8; see also *id.*, p. 11).

nation or the continuing effects of pre-decree discrimination. Before making this election, each employee will be furnished with extensive information, approved by the decree court (and, at any plant where a private action is pending, by the court presiding over that action as well) designed to assure that the election is an informed one.

Shortly after the decrees' entry, a number of employees and organizations moved to intervene to challenge the decrees' validity and to have them set aside. The district court granted intervention to the employee-movants, but denied intervention to the organizational movants, including National Organization for Women ("NOW"). However, the court allowed NOW to file an amended motion on behalf of three representative female employees "specifically appointed by NOW . . . and represented by NOW's counsel throughout the proceedings," 517 F.2d at 839.

On the merits, the district court concluded that the challenges to the validity of the decrees were without merit. In particular, the court held that the release which employees will sign if they elect to accept the tender of back pay is a valid release, and will bind any employee who executes it knowingly and voluntarily.

The intervenors thereupon appealed, and in August, 1975, the Fifth Circuit issued its 55-page decision upholding the decrees in all respects. The court concluded "that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree," 517 F.2d at 881. The court stated that "the remarkable feature of the present decrees is that so many self-interested parties were able to leave so few unresolved remedial issues. The major concessions yielded by the defendants could have been obtained only by all parties to the negotiations working together un-

selfishly toward a settlement keyed to broader public goals," *id.* at 876. The court found this "one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord," *id.* at 848.

In its opinion, the court below discussed at length each of the arguments advanced by intervenors, and found each without merit. We defer our description of the court's reasoning until the argument section of this brief. One particular, however, warrants mention now. Although the court declared that it would have been *lawful* to condition the back pay tenders upon the waiver of claims for non-monetary relief for continuing effects of pre-decree discrimination, *id.* at 853, the court construed the "plain language" of the decrees in the instant case as not requiring such a waiver, *id.* at 852, n. 30, 853, 856.[3]

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[3] Consent Decree I provided that employees accepting back pay tenders would "be required to execute a release . . . of any claims . . . resulting from any alleged violation . . . occurring on or before the date of entry of this Decree . . . Such release will also bar recovery of any *damages* suffered at any time after the date of entry of this decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree" (emphasis added). The court concluded that the word "damages" was not susceptible of a construction encompassing non-monetary relief, even though all parties to the decree, in their briefs, indicated that they had *intended* such a construction.

After the decision of the court below, the defendants moved in the district court to amend the decree to state expressly that the release encompasses *all* claims (including non-monetary claims) relating to the continuing effects of pre-decree discrimination. The district court, after ascertaining that all parties to the decree had indeed so intended when they negotiated the decree, granted the amendment as an exercise of the courts' traditional equitable power of reformation: "to make a mistaken writing conform to antecedent expressions on which the parties agreed." 3 Corbin, *Contracts* § 614, at 723 (1960 ed.).

The Harris petitioners have recently appealed this amendment to the Fifth Circuit. Because the district court had denied their motion to intervene to oppose the motion to amend, there is a serious question as to their standing to prosecute the appeal. In an effort to overcome this deficiency, the Harris petitioners also filed a petition for manda-

ARGUMENT

In this case, the three government agencies responsible for securing equal employment opportunity, after six months of intensive negotiations with the major employers and union in the steel industry, achieved a landmark: decrees radically reforming employment practices throughout an entire industry, and providing 46,000 employees with an immediate opportunity to share in a backpay offer totaling nearly $31 million. A measure of the achievement represented by these decrees is that the reforms extend to employees at 240 plants, even though employees at only 12 of these plants had instituted a Title VII action in the decade since Title VII's passage.

Petitioners have been embarked upon a quixotic quest to topple this unprecedented achievement. Whereas the parties to the decrees expected that the decrees would be a catalyst for similar industry-wide reforms in other industries, petitioners have thus far succeeded by their sheer litigiousness[4] in making the "cost" of such settlements seem prohibitive, and thus have deterred others from following the same path.[5] In consequence, Congress' selection of "co-

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mus, but that petition has been denied by the Fifth Circuit. The "appeal" is still pending; petitioner's motions for expedition of the appeal, and for a stay of the back pay tenders pending appeal, have been denied by the Fifth Circuit.

[4] To provide but a glimpse of the scope of the Harris petitioners' efforts, their attacks upon the decrees are *currently* (i.e. two years after the decrees were entered) pending not only in this Court, but also in the Fifth Circuit (on appeal from amendment of Consent Decree I), in the decree court (on motion for reconsideration of the amendment), and in five private Title VII actions where they are asking the courts to refuse to allow the backpay tenders under Consent Decree I to go forward to the employees at the plants involved in such private actions. These quests have been accompanied by extensive discovery, briefing, hearings and argument.

[5] We are able to state this from direct experience, for this Union—which is obviously committed to the approach taken in the decrees—is also the principal bargaining representative of employees in the aluminum, copper, chemical, lead, zinc, silver, gold, can manufacturing, iron ore, and steel fabricating industries.

operation and voluntary compliance" as "the preferred means for achieving [the] goal" of equal employment opportunity,[6] has been frustrated.

The impetus for industry-wide reform cannot be rekindled until the steel industry decrees have been finally vindicated. If this Court grants certiorari, that cause will be set back yet another year.

This price might be worth paying if petitioners' claims regarding the validity of the decrees were substantial. But the reality is that each of petitioners' claims is frivolous.

I. NOW's PETITION

NOW advances two contentions, in addition to joining the Harris petitioners' attack upon the release. We deal with the release in Part II. Here, we discuss NOW's claims: (a) that NOW was wrongly denied intervention; and (b) that the decree does not go far enough in extending remedies to women.

A. *Intervention*

NOW's quest for intervention is of doubtful legal validity —NOW can point to no cases supporting its position—and we doubt that it could be considered worthy of review even if viewed in its own right. But here there is a more basic reason why the intervention question does not warrant certiorari: in the circumstances of this case, the denial of intervention to NOW is of solely academic interest; indeed, unless the decision below is to be reversed on substantive grounds, NOW's quest for intervention is moot.

NOW did not seek to intervene to secure relief for *itself*, but only to secure relief for women whom it claimed to represent. While the district court would not allow NOW to intervene, it granted intervention to three women "specifically appointed by NOW . . . and represented by NOW's

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[6] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

counsel throughout the proceedings," 517 F.2d at 839. On behalf of these women, NOW advanced all of the arguments which it would have made had it been allowed to intervene in its own name, *id.* at 839, n. 11. "Having participated through its nominees and counsel during these entire proceedings, NOW cannot be heard to complain of the adequacy of the feminist representation," *id.* at 846.

Thus, even if NOW's intervention claim could be considered significant as an abstract question — which we doubt—it is of absolutely no practical significance in *this* case, where NOW effectively enjoyed all of the prerogatives which intervention would have afforded it. The total artificiality of the issue is evident from the consideration that if this Court reversed on the intervention ground alone there would not even be reason to remand the case, for there is nothing which NOW could contribute on the merits which it has not already had an opportunity to contribute through its nominees.

B. *Inadequacies of the Consent Decree*

NOW's other challenge is that the decrees do not go far enough; that they leave certain vestiges of discrimination against women unremedied (e.g. the plight of women hired during World War II but fired to make room for returning veterans). With one exception, these claims relate only to women who will not be offered back pay under the decree, and thus who will be as free to seek relief through private actions as they were before the decrees were adopted.[7] As the court below explained: "The decrees themselves are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the

[7] We do not mean to suggest that we think the decrees' remedies are in any respect inadequate. On the contrary, we believe—as did the court below, 517 F.2d at 879-881—that the decrees contain the full measure of relief which women could hope to achieve through litigation.

steel industry," 517 F.2d at 881. The one claim which might involve women who will be offered back pay (and who thus may surrender their right to sue)—that relating to the goals for female promotion into trades and crafts—was correctly found by the court below to be frivolous, *id.* at 880.

II. HARRIS' PETITION

The Harris petitioners focus exclusively upon the validity of the release. They now concede (although they argued strenuously to the contrary below) that an employee may settle his claim for *past* damages for past discrimination. But they continue to insist that (a) an employee may not give up the right to seek *non-monetary relief* for the continuing effects of past discrimination; and (b) an employee may not settle his claim for *damages* for the continuing effects of past discrimination.

As to the first of these claims, it is sufficient to note that the present case, in the posture in which it is now before this Court, does not present the question. The Fifth Circuit construed the consent decree's release provision as *not* encompassing a waiver of claims for non-monetary relief for the continuing effects of past discrimination, *id.* at 852 n. 30, 853, 856. In light of that construction, the validity of such a waiver is not presented.[8]

This leaves, as the only release issue actually ripe for decision, whether an employee may settle his claim for *damages* for the continuing effects of past discrimination. Petitioners' contention that such a claim may not be settled is patently frivolous. It is equivalent to saying that an auto-

[8] To be sure, events *subsequent* to the decision below have created a situation in which this issue *might* someday come to this Court. The district court has amended the decree to provide for such a waiver, and the Harris petitioners have appealed to the Fifth Circuit raising the very points which they seek to submit, prematurely, to this Court. See p. 5, n. 3, *supra*.

mobile case cannot be settled because the full extent of the victim's suffering (the continuing effects of the past wrong) are not yet known.

As the court below recognized, it is impossible to design a curative system for past assignment discrimination which eliminates all "continuing effects" of that discrimination, i.e. which immediately installs every victim of that discrimination in his "rightful place." (For example, an employee hired twenty years ago and initially assigned to a desirable department might have progressed by now to a highly skilled job; if, instead, he was discriminatorily assigned elsewhere, he will not have received the requisite training during the intervening twenty years to qualify him to immediately assume that job). Accordingly, even after fully-contested litigation the outcome is a curative system under which "many aggrieved employees will not immediately achieve their 'rightful places,' but only a more favorable start on the road toward better jobs," 517 F.2d at 855 (citing cases).

The consent decree in the instant case contains a curative system patterned after those emerging from contested litigation, and in addition provides for a tender of sums to minority and female employees which the government believes "adequate . . . to compensate individual employees for the past *and continuing effects* of the alleged discriminatory practices which the decrees enjoin," 517 F.2d at 838 (emphasis added). Of course, each employee is free to decide that the tendered amount is insufficient and to reject it and sue for more. But surely, in a Title VII case as in any other, parties are entitled to settle on the basis of their predictions of how they would fare in contested litigation. Are employees to be told that they may not have the option of acceptance if that is their preference?

Petitioners claim that a waiver of damages for the continuing effects of past discrimination is "prospective", and

thus impermissible, citing *Alexander, supra,* 415 U.S. at 52. But this is mere semanticism. A waiver is impermissibly "prospective" if the employee licenses *future* discrimination against him. But by definition, we are dealing here only with *past* discrimination (even though the effects may continue to be felt in the future). The court below carefully and repeatedly emphasized that the release does not—and could not lawfully—require a waiver with respect to acts of discrimination occurring after the date of the decree, 517 F.2d at 853-856.

CONCLUSION

No issue in this case warrants this Court's attention. Some are not even ripe for review. The petitions for certiorari should be denied.

Respectfully submitted,

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